No. 80-809

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LITTON SYSTEMS, INC.,

Petitioner,

v.

ALVIN L. LUNDY,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

(1) At the time of Claimant-Respondent's claimed injuries, DD-966 was a vessel within the meaning and purview of 33 USC Section 905(b) and Section 902(21), and Litton Systems, Inc. was the vessel's owner, owner *pro hac vice*, operator, or master and is subject to liability for the vessel negligence of DD-966 even though Litton Ship Systems, Inc. was also the employer of Claimant-Respondent and the exclusive compensation remedy provision of 33 USC Section 905(a) and 933 (i) of the Act do not apply.

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ALVIN L. LUNDY,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Claimant-Respondent prays that a Writ of Certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 20, 1980. *Lundy v. Litton Systems, Inc.*, 624 F.2d 590.

JURISDICTIONAL STATEMENT

The Claimant-Respondent does not question the jurisdiction as set forth in the Petition.

STATUTES INVOLVED

The Claimant-Respondent does not question the statutes involved as set forth in the Petition, but does ask that this Writ of Certiorari be denied.

COUNTER-STATEMENT OF THE CASE

On July 1, 1976, DD-966 had been on its first builder's sea trials on June 28 and 29, and had trouble with the prop while on said trials. DD-966 returned to Ingalls' dock on the navigable Pascagoula River and on July 1, 1976 was in the process of returning to sea to complete the builder's sea trials. DD-966 did in fact return to sea trials on the early morning of July 2, 1976.

Respondent was on board DD-966 on July 1, 1976 as directed by his employer, Litton Systems, Inc. He signed on board on the morning of July 1, 1976 at 10:00 A.M. and was doing routine readiness for preparation of sea trials in his field. This included checking telephones, fuses, checking out the generators and going through a check list that he had to go through whenever a vessel went on sea trial. He was also calibrating shipboard meters and was setting up a telephone communication for engineering and the crew members. At the time he was injured, there was a problem in generator number 3, and as he was going down an escape hatch, fell, severely injuring himself. On the escape hatch where he fell, a chain which guards the opening was not in place. The area where he fell was enclosed and was not lighted. Respondent did not have any maritime experience on board ships of any type, kind or size.

The affidavit of Mark Farnum indicates that on July 1, 1976 DD-966 was approximately 97% complete. There

were twenty-eight (28) escape hatches on the main deck of DD-966 which were provided for access to spaces below the main deck. These hatches were left open by Petitioner during preparation for builder's trials so that workmen could obtain immediate access to compartments below the main deck.

The agreement between Litton Systems, Inc. and International Brotherhood of Electrical Workers, which was in full force and effect on July 1, 1976, was introduced as Exhibit 2 to the deposition of O. W. Patterson. It appears from Article 22, page 37 of said contract, that employees of Litton were taken from their regular work to make up a crew for sea trials and deliveries, and were required to stand six (6) hour watches. Under this section of the contract Litton Systems, Inc. recognized that the work that the craftsmen would be engaged in would be aboard a vessel or ship at sea.

O. W. Patterson was the Master of DD-966 on July 1, 1976. He had been the Master on the first builder's sea trial on June 28 and 29, 1976. He had thirty-five (35) years at sea and had a Master's license. He recognized that on sea trials he had people on board who did not understand the hazards at sea. He further recognized that the duties that the Respondent performed in seeing after the generators was necessary for the ship to operate and that ships at sea had personnel who had done the same job on seagoing vessels. Most of Ingalls' sea trials lasted about 48 hours. A Master of a vessel is in equal rank to the Skipper of a Navy vessel. He stated that as Master he was responsible for the safety of all personnel and operation and the deployment of ships to a predeter-

mined location in the Gulf of Mexico to conduct equipment and system tests during the trial. He conceded that the safety regulations required that all open hatches had proper guard rails.

He stated that as the Master of DD-966, he had two (2) watch officers, and four (4) quartermasters to run the bridge of the ship. He stated that there were permanently assigned approximately twenty (20) men in fire and damage control. Sea trials were done under the exclusive operational control of Litton Systems, Inc. On the date of the accident, Litton still had control of said vessel and had not delivered it to the U.S. Navy.

Based on these facts the Court of Appeals held that Respondent had a 33 USC Section 905(b) negligence action against Litton Systems, Inc., his employer, who was also owner of DD-966 at the time of the claimed injury. The Court of Appeals further held that incomplete ships upon which 33 USC Section 902(3) employees are working at a site within 33 USC Section 903 coverage of the Act are vessels within the meaning of 33 USC Section 902(21).

ARGUMENT

I.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISION OF THIS COURT.

In 1972, when the Longshoremen's and Harbor Workers' Act was amended, Congress extended the maritime jurisdiction landward to include any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker, and including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employer in loading, unloading, repairing, or building a vessel.

Prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Act, 33 USC Section 902 did not contain a definition of the word "vessel." The amendments were enacted on November 26, 1972 and 33 USC Section 902(21) was added and is as follows, to-wit:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member."

It is therefore submitted that Congress intended and did change the definition of "vessel."

At the time of the enactment of the amendments to the Longshoremen's and Harbor Workers' Act Congress was aware of the definition of a "vessel."[1] Congress did

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[1] *"Vessel" is included in all means of water transportation.* The word "vessel" includes every description of water carft or other

[footnote continued]

not define "vessel" as one being in navigation, but simply said the term "vessel" meant any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer, master, officer or crew member.[2]

33 USC Section 905(b) provides in the event of injury to a person covered under this chapter caused by the negligence of the vessel, then such person may bring an action against such vessel as a third party in accordance with the provision of Section 33 of the Act.

Employees covered under the Act are any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, and ship breaker.[3]

It is therefore submitted that Congress intended to and did grant to an injured shipbuilder who is covered under the Act and who was injured by the negligence of a vessel, a 905(b) negligence action against his employer who was also owner of the vessel. This is true because in Section 905(b), *supra*, in the third sentence, Congress stated that if a person was employed by a vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of the person engaged in providing shipbuilding or repair services to the vessel. In the last sentence, Congress stated that the remedy provided in this subsec-

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artificial contrivance used, or capable of being used, as means of transportation on water. 1 USC Section 3.

[2] 33 USC 902(21).

[3] 33 USC 902(3).

tion shall be exclusive of all other remedies against the vessel except remedies available under this Act. This indicates that an employee may draw compensation as well as sue a vessel for 905(b) negligence.

By the 1972 amendments, Congress rejected the thesis and this Court's previous decisions that a vessel should be liable without regard to its fault for injuries sustained by employees covered under the Act while working onboard the vessel, and specifically took away the vessel's absolute nondelegable duty to provide a seaworthy vessel for longshoremen and others who perform work on the vessel which by tradition had been performed by seamen.[4]

Congress also rejected the vessel's right to recover the damages for which it was liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore had breached an express or implied warranty of workmanlike performance to the vessel under this Court's previous decisions.[5]

In lieu of these previous causes of action, Congress created a new 905(b) negligence action for those employees providing stevedoring, shipbuilding or repair services to vessels who are injured because of the vessel's negligence.

The legislative history, Senate Report No. 92-1125, 92D Congress, 2d Sess., p. 102, 103 and 104 states as follows:

> "Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to

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[4] *Seas Shipping Company v. Sieracki*, 328 US 25 (1946).

[5] *Ryan Stevedoring Co. v. Pan Hellenic S.S. Corp.*, 350 US 124 (1956).

all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as landbased third parties in non-maritime pursuits.

"The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty', or the like.

"Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness." ***

* * * * *

"Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

* * * * *

"The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is em-

ployed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to *ship building* or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or *ship builders* or repairmen as apply when an independent contractor employs such persons." (Emphasis added).

It was clearly the intent of Congress, in providing a 905(b) negligence action, to impose a duty on all vessel owners to meet the objective of encouraging safety because the vessel would still be required to exercise the same care as a land-based person in providing a safe place to work. This duty clearly extends to persons furnishing longshoring services, *shipbuilders* and ship repairers equally.

Congress clearly intended that the doctrines set forth in *Reed v. S.S. Yaka, supra,* survive the amendments to the Act and that an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.

In *Edmonds v. Compagnie Generale Transatlantique*, 443 US 256, 61 L Ed 2d 521, 99 S Ct 2753 (1979), this Court reversed the United States Court of Appeals for the Fourth Circuit because of its interpretation of the first two sentences of Section 905(b), *supra*. This Court construed the second sentence of said section to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its non-stevedoring capacity contributes to the injury. In construing the second sentence this Court cited *Jackson v. Lykes Bros., supra,* and *Reed v. Yaka, supra,* as upholding the longshoreman's negligence or unseaworthiness action against the shipowner-stevedorer. (See footnote 13). It would necessarily follow that this Court would construe the third sentence to permit a third-party suit against the vessel providing its own shipbuilding or repair service when negligence in its owner, owner *pro hac vice*, operator, or master's capacity contributes to the injury. Therefore, the Court of Appeals' decision in the case at bar does not conflict with the decisions of this Court.

On page 5 of its brief, the Petitioner cites *Haas v. 653 Leasing Company*, 425 F. Supp. 1305 (E.D.Pa. 1977); *Williams v. Avondale*, 452 F.2d 955 (5th Cir. 1971); *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (5th Cir. 1968); *Frankel v. Bethelem-Fairfield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942), cert. denied, 319 U.S. 746 (1943). Each of these cases arose prior to the 1972 amendments and have no application to the case at bar.

On page 6 of Petitioner's brief, it is asserted that no other Court of Appeals or District Court prior to the decision in the case at bar had held that a covered shipbuilder employee may maintain a 905(b) third party negligence against the employer for injuries received

while engaged in completion of a launched vessel under construction in navigable waters. In the case of *Duncan v. Dravo Corp.*, 426 F. Supp. 1048 (Penn. 1977) the District Court allowed a 905(b) cause of action for a ship repairer on a vessel not in navigation against his employer-barge owner.

The Petitioner on page 6 of its brief cites *Hollister v. Luke Construction Company, et al,* 517 F.2d 920 (5th Cir. 1975) as authority under Point One of its brief. *Hollister, supra,* did not involve a claim under 905(b) but involved a Jones Act claim, an unseaworthiness claim, and a general maritime negligence claim. Since the barge did not meet the "vessel in navigation" requirement, the Jones Act and unseaworthiness claims were dismissed and since the barge was only partially completed its maritime negligence claim was dismissed. Therefore, this case has no application to the case at bar.

Bloomer v. Liberty Mutual Insurance Company, 100 S.Ct. 925 (1980) is cited as authority under Point One on page 8 of the Petitioner's brief. This case merely held that a stevedore-employer paying compensation to longshoreman injured on ship who sues the shipowner for negligence is not required under the Longshoremen's and Harbor Workers' Act to share longshoreman's litigation costs and has no application to the case at bar.

The legislative history of the adoption of the 1972 amendments supports the conclusion reached by the Court of Appeals in this case that Congress did not intend to overrule *Jackson v. Lykes Bros., supra,* and *Reed v. S.S. Yaka, supra,* in permitting a longshoreman's negligence or unseaworthiness action against the shipowner-employer.

On page 9 of Petitioner's brief, it cites *Bossard v. Port Allen Marine Service, Inc.,* 624 F.2d 671 (5th Cir. 1980)

and *Hess v. Port Allen Marine Service, Inc.*, 624 F.2d 673 (5th Cir. 1980) as authority under Point One of its brief. Exxon was first sued as owner of the barge under Section 905(b) and after failing there, Plaintiff then sought action against Port Allen, alleging that it was liable as owner *pro hac vice* of the barge Exxon 217. The 5th Circuit, in affirming entry of summary judgment by the District Court, stated that Port Allen was the bailee and did not have the control necessary to be deemed an owner *pro hac vice*, and did not have the complete control over the barge required for ownership *pro hac vice*. In the case at bar, it is undisputed that the sea trials were done under the exclusive operational control of Litton Systems, Inc.

It is respectfully submitted that the decision of the Court of Appeals in this case does not conflict with the decisions of this Honorable Court.

II.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION BY FOLLOWING THE PRECEDENT SET BY ITSELF AND OTHER CIRCUITS.

The Court below followed the precedent set in *Reed v. S.S. Yaka, supra, Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402 (La. 1974), *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 41-44, (3rd Cir. 1975), cert. den., 423 US 1054 (1976), *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (Vir. 1976), *Napoli v. Hellenic Lines*, 536 F.2d 505 (2nd Cir. 1976), *Duncan v. Dravo Corp.*, 426 F. Supp. 1048 (W.D. Penn. 1977), *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977), *Allied Towing Corp. v. Tatem*, 580 F.2d 702 (4th Cir. 1978). The Court of Appeals below simply held that the incompleted ship in question was a vessel for purposes of a Section 905(b) negligence action.

It is undisputed that DD-966 had been to sea on one occasion on June 28 and 29 and was preparing to return to sea on July 1, 1976 and did in fact return to sea on the early morning of July 2, 1976. It is undisputed that in the agreement between Litton Systems, Inc. and the International Brotherhood of Electrical Workers, which was in full force and effect on July 1, 1976, that the employees of Litton were taken from their regular work to make up a crew on what the agreement called a vessel. It is undisputed that the vessel was under the control of O. W. Patterson, Master of said vessel, on July 1, 1976, that sea trials were under the exclusive operational control of Litton Systems, Inc., and on the date of the accident, Litton had control of said vessel. The Petitioner would infer to the Court that the Court of Appeals found that Litton Systems, Inc. was the owner when in truth and in fact this point is undisputed by their own witnesses, Farnum and Patterson.

As owner, Congress intended to give the Respondent a cause of action for negligence to meet the objective of encouraging safety and requiring the vessel owner to exercise due care. The Court of Appeals followed the Congressional intent and prior precedents of this Court as shown in Point One of this brief.

While DD-966 was not in navigation as far as the Jones Act coverage, or an unseaworthiness claim, it was certainly operable and was being operated by a licensed Master and 905(b) applies.

The Petitioner on page 11 asserts that the Court of Appeals' decision is in variance with the Congressional intent but does not point out to this Court where the variance may be.

On page 12 of Petitioner's brief, it asserts that it is settled law that a ship repair employee may not maintain

a third party negligence tort action against his contractor-employer, on the theory that the employer was the owner or owner *pro hac vice* of the vessel under repair either prior or subsequent to the adoption of the 1972 amendments, citing *Olsen v. Todd Shipyards Corp.*, 435 F. Supp. 568 (W.D. Wa. 1977); *Lawson v. United States*, 605 F.2d 448 (1979); *Bossard v. Port Allen Marine Service, Inc., supra;* and *Hess v. Port Allen Marine Service, Inc., supra.* These cases merely hold that the employer in each instance was a bailee and not owner *pro hac vice* under the facts of each case because each employer did not have sufficient control necessary to be deemed an owner *pro hac vice.* In the case at bar it is undisputed that Litton Systems, Inc. was the owner and had complete operational control of said vessel at the time of the injury complained of. Each of the cases cited by the Petitioner recognized that if the employer occupied the position of owner *pro hac vice* with respect to the vessels in question, the employees could maintain an action notwithstanding the provision of 33 USC Section 905. In *Lawson, supra,* the Plaintiff was allowed to recover against the United States under 905(b).

The remainder of Petitioner's argument on page 13 and page 14 of its brief is in conflict with the Congressional intent and history. The Petitioner has not attacked the constitutionality of the amendments, and therefore its philosophical argument is not in order.

It is respectfully submitted that the Court of Appeals' decision in this case should not be reviewed on the basis of any arguments set forth in Point Two of Petitioner's brief.

III.

THE COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

Petitioner cites *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (1968) on page 15 under Point Three. In this case it was unequivocally stated that Lykes was the owner of the vessel in question. In the case at bar, it is undisputed that Litton Systems, Inc. was the owner and had exclusive control of said vessel at the time of the alleged injury. The Court held that the warranty of seaworthiness extended to shore-based worker only at a time when the vessel was ready for sea and in navigation. This case has no application to the case at bar.

On page 16 of Petitioner's brief, it cites *Haas v. 653 Leasing Company, supra,* which is a District Court case and which arose out of an injury occurring on September 20, 1971. This was prior to the 1972 amendments which were effective November 27, 1972. In *Haas*, there was a claim for unseaworthiness and maritime negligence. The unseaworthiness claim was rejected because the vessel was not in navigation. The maritime negligence claim was rejected because of the inapplicability of the owner *pro hac vice* argument to negligence as opposed to unseaworthiness claim. However, the Court stated that the *pro hac vice* argument was inapplicable at least prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Petitioner asserts that there is a conflict between the Circuit Courts of Appeals on the question of whether under the 1972 amendments a covered employee may bring a Section 905(b) action against his employer *qua* vessel. However, a review of the authorities cited by the

Petitioner does not indicate a conflict between the Circuit Courts of Appeals since the 1972 amendments, which were effective on November 27, 1972. It cites two District Court cases from the 9th Circuit which may or may not be in conflict and states that in all the cases cited on the last paragraph of page 16 and page 17 of its brief all vessels involved were a completed vessel in commerce and in navigation, which is an error, as will be shown hereafter.

Murphy v. Woods Hole, Martha's Vineyard, et al, 545 F.2d 235 (1st Cir. 1976) arose out of an injury on October 25, 1972 which was prior to the effective date of the amendments to the Act. The Court held that it would give Section 905 its ordinary meaning and hold that a negligence action of the present character, brought by a harbor worker covered by the pre-1972 Act for injuries caused by the alleged actual negligence of the vessel owned by his employer, was barred by Section 905.

Arvidson v. Dillingham Corp., 462 F.2d 1 (9th Cir. 1972), cert. denied, 409 U.S. 983 (1972) was decided on May 26, 1972 and arose prior to the effective date of the amendments to the Act. The Court held that where the employer is also the shipowner, Section 905 does not preclude an accident for unseaworthiness but that the recovery would not be extended to an action for negligence. Congress in their 1972 amendments took away the unseaworthiness cause of action but granted injured ship builders a 905(b) negligence cause of action against the owner-employer.

Petitioner next cites *Buna v. Pacific Far East Line, Inc.,* 441 F. Supp. 1360 (N.D. Ca. 1977) and *Baker v. Pacific Far East Lines, Inc.,* 451 F. Supp. 84 (N.D. Ca. 1978) as being in conflict although they are not cases

from the Court of Appeals but rather District Courts. In *Baker, supra,* the District Judge interpreted the first, second and third sentences of Section 905(b). He interpreted the second and third sentences of Section 905(b) as Congress's attempt to overrule *Yaka, supra.* This Court in *Edmonds v. Compagnie General Transatl., supra,* interpreted the second sentences of 905(b), (footnote 13), citing *Jackson v. Lykes, supra,* and *Reed v. S.S. Yaka, supra,* as upholding a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore. The same interpretation would apply to the third sentence involving shipbuilders and ship repairers.

Therefore, this Honorable Court in *Edmonds, supra,* has overruled the interpretations given to 905(b) in *Buna, supra,* and *Baker, supra,* and therefore no conflict exists between the Circuit Courts of Appeals.

In *Reed v. Yaka,* 373 U.S. 410, reh. den. 375 U.S. 872 (1963), this Court recognized that a bare boat charterer was personally liable for the unseaworthiness of the chartered vessel and that the Longshoremen's and Harbor Workers' Act did not prevent recovery by a plaintiff for the employer-charterer's breach of its warranty of seaworthiness. Reed's employer at the time of his accident was also the bare boat charterer of the vessel "Yaka". Reed was performing longshoremen's service and the evidence reflected that the negligence of his employer-bare boat charterer was the cause of his injuries. Reed's employer had full possession and control of the vessel at the time of the injury and the question was whether or not the Longshoremen's Act prevented recovery by Reed for his employer-bare boat charterer's breach of its warranty of seaworthiness. This Court held that the Longshoremen's and Harbor Workers' Act did not bar the employee from suing his employer-bare boat charterer.

In the case at bar, Litton Systems, Inc. had full possession and control of DD-966.

In the case of *Griffith v. Wheeling Pittsburgh Steel Corporation,* Cer. den. 96 S. Ct. 785, (3rd Cir. 1975), interpreted 33 USC Section 905(b) as follows, to-wit:

> "The effect of the second clause of the first sentence of §905(b) is to eliminate the vessel's *Ryan* action against the stevedore. The effect of the next from last sentence is to eliminate the longshoreman's *Sieracki* third party action for unseaworthiness against the vessel. The effect of the first clause of §905(b) is to create in their place, a new negligence third party cause of action against the vessel, and the effect of the last sentence is to make that cause of action the exclusive remedy of a longshoreman against a vessel. The second sentence relieves the vessel from liability for negligence caused by persons engaged in providing stevedoring services, thus preventing the imposition of liability on the vessel on some respondeat superior or absolute duty of care basis. ***
>
> "But while logic and common sense suggest the literal application of §905(a), the ghost of *Sieracki-Ryan* stands in the way. The Supreme Court has already construed the exclusive remedy provision as permitting a suit against a *pro hac vice* owner who was also an employer. In *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448 (1963), a longshoreman was injured as a result of an unseaworthy condition on board the vessel The Yaka, which was under bareboat charter to Pan-Atlantic Steamship Corporation, his employer. Reed brought an in rem action against the vessel. He was not a member of the crew, and thus was covered under LHWCA. Reviewing the way in which *Sieracki* and *Ryan* had already made an end-run around the

exclusive remedy provision in §905(a) (then §905), Justice Black, writing for the Court, concluded:

> 'In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. . . .' 373 U.S. at 415, 83 S. Ct. at 1353.

"Thus §905, now §905(a), was held to be no bar to a suit against a vessel chartered to a *pro hac vice* owner which was also an employer liable for compensation payments. As the treatise writers have observed:

> 'After *Reed v. The Yaka* the longshoreman's action might just as well have been brought directly against his employer—which would have simplified the situation procedurally. However, in the customary employment situation, the parties, out of politeness or inertia, continued to observe the elaborate formalities of the *Sieracki-Ryan* ritual: longshoreman sued ship or shipowner, who impleaded employer in his third party indemnity action. . . .'
>
> G. Gilmore & C. Black, The Law of Admiralty §6-55, at 445 (2d ed. 1975) (footnote omitted).

Since Congress made no change in the operative language of the exclusive remedy provision, we would appear to be bound by the eviscerating construction of *Reed v. The Yaka,* supra. Congress was aware of that construction, and deliberately

chose to deal with it only to the limited extent of the second sentence is §905(b). The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence. See 1A Benedict on Admiralty §27, at 2-24; §115, at 6-16 (7th ed. 1973)."

Also, see *Napoli v. Hellenic Lines,* 536 F.2d 505 (2nd Cir. 1976).

In the case of *Duncan v. Dravo Corporation,* 426 F. Supp. 1048 (Penn. 1977), the U.S. District Court held as follows in interpreting Section 905(b):

"[1] In the 1972 amendment of §905, Congress revitalized the exclusive remedy provision by eliminating the vessel's right to recover indemnity from the employer and eliminating unseaworthiness as a basis for recovery from the vessel. But in so doing, Congress chose not to completely negate the scheme of vessel liability established by judicial precedent. It did not preclude all suits against the vessel for damages, even though unseaworthiness would no longer afford a no-fault basis for recovery. Section 905(b) expressly provides that a negligence action against the vessel is not excluded by §905(a), reflecting a Congressional determination that although longshoremen do not incur the peculiar hazards of seamen which give rise to the extensive remedy of unseaworthiness, permitting a fault-based remedy in negligence would encourage vessel safety without detracting from the policies underlying §905(a).

"[2-5] Nor did Congress negate the judicial precedent permitting suit against the vessel even when the vessel is also the employer. To the contrary, Congress intended to afford all longshoremen, regardless

of whether employed directly by the vessel or by an independent contractor, identical remedies for injuries suffered. The only limitation imposed in §905(b) on a negligence action against a vessel-employer is that the longshoreman cannot sue for the negligence of those providing longshoring services. This limitation is entirely consistent with Court precedent of treating the vessel-employer as separate entities for purposes of §905. The vessel-employer will not be held responsible for damages, other than compensatory benefits due under the Act, for breaches of duties arising out of the employer-employee relationship, but it will be subject to liability for damages caused by negligence in the capacity of vessel owner. Whether the vessel owed the longshoreman a duty and was at fault will be determined by traditional negligence principles, as if the longshoreman were a business invitee of a land-based property owner. *Anuszewski v. Dynamic Mariners Corp. Panama,* 391 F. Supp. 1143 (D.Md. 1975); *Ramirez v. Toko Kaiun K.K.,* 385, F. Supp. 644 (N.D.Cal. 1974).

"[6] *This brief history reveals that to hold that a §905(b) negligence action is precluded when the vessel is not in navigation would compel an unwarranted and overly restrictive reading of the statute.* The 'ghosts' of *Sieracki* and *The Yaka*, supra, have clearly survived the 1972 amendments insofar as they permit a longshoreman to sue the vessel for damages whether the longshoreman be employed by the vessel or not. Even before the 1972 amendments, the Supreme Court had not concluded in *Roper,* supra, and *West,* supra, that in negligence analysis a vessel not in navigation did not owe a longshoreman a duty of reasonable care, or that the longshoreman was precluded from recovering damages from the vessel for its negligence. In both

Roper and *West*, in fact, after determining that unseaworthiness would not avail a remedy, the Court noted that no negligence was proved. Congress has now specifically provided that a negligence remedy is available and that Courts must engage in traditional negligence analysis to determine if a duty was owed and breached, and we see no reason to limit that action to situations in which the longshoreman could have recovered for unseaworthiness." (Emphasis added).

The case of *Fitzgerald v. Compania Naviera La Molinera,* 394 F. Supp. 402 (L.A. 1974), the District Court, in interpreting Section 905(b) held as follows, to-wit:

"***Thus, where the vessel owner employs his own longshoremen or ship repairmen, and one of these employees is injured by the negligence of a member of the crew of the vessel, the injured employee may sue his employer; the suit against the vessel owner is not to be denied because the usual scheme of structuring the employment relationships along the waterfront is not followed."

Also, see *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (Vir. 1976) and *Allied Towing Corp. v. Tatem,* 580 F.2d 702 (4th Cir. 1978).

In the case of *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977), 905(b) was discussed by the Fifth Circuit as follows:

"It is important to note, however, that the basic problem envisioned in *Yaka* is still present. Why should an employee be treated differently solely because the ship on which he is injured happens to be owned by his employer instead of a third party? We think that Congress was sympathetic to this problem when it amended the LHWCA. Section

905(b) allows an employee to sue a 'vessel' for its negligence. The term 'vessel' is defined in the 1972 Amendments to include 'said vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer, master, officer, or crews member.' 33 U.S.C. §902(21) (Supp. II, 1972). Our legislators were well aware of the fact that shipowners, owners *pro hac vice* and charterers frequently have their own employees perform tasks covered by the LHWCA, but no special provision was made for that situation.

"Our interpretation of the statute is amply supported by its legislative history. Far from expressing an intent to overrule *Yaka* legislatively as it had done with *Ryan* and *Sieracki*, the House Report demonstrates that Congress intended the *Yaka* rule to survive:

> 'The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (83 S.Ct. 1349, 10 L.Ed.2d 448) (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (87 S. Ct. 1419, 18 L.Ed.2d 488) (1967), held that the unseaworthiness remedy is available to the injured employee. *The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in*

> *performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.* (Emphasis added).

> "[3] We hold, then, that an employee may sue his employer qua vessel if he was injured as a result of the vessel's negligence. We note that the other two circuits which have considered this issue have resolved it as we have. *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir. 1976); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S. Ct. 785, 46 L.Ed.2d 643 (1976). Since the district court dismissed this action because the vessel and the employer were one and the same we must reverse and remand for proceedings not inconsistent with this opinion." (Footnotes omitted).

In *Duncan v. Dravo, supra,* the barge the injured employee was working on repairing was a vessel not in navigation. The Court said:

> "Because this unseaworthiness remedy would not have been available to longshoremen repairing a vessel not in navigation, the Defendant asserts that a negligence action under amended §905(a) & (b) is likewise unavailable. We believe that §905(b) and the judicial precedent which survived Congressional revision of the Act provide otherwise."

Congress in its wisdom in Section 905(b) gave a cause of action for negligence of a vessel in the event of injury to a person covered under the Act. For the first time in the Longshoremen's and Harbor Workers' Act it defined

"vessel" as any vessel upon which or in connection with any person entitled to benefits under the Act suffered injury or death arising out of his employment. That cause of action lies not only against the vessel, but the vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer, master, officer, or crew member.

It is submitted that there are not any existing conflicts between the Circuit Courts of Appeals and that the Petition for Writ of Certiorari should be denied.

CONCLUSION

It is therefore submitted that the Court of Appeals' decision does not conflict with the decisions of this Court and that there are no existing conflicts between the Circuit Courts of Appeals and that the Petition for Writ of Certiorari should be denied. It is further submitted that the Claimant-Respondent in this cause has a cause of action against Litton Systems, Inc. for its negligence, if any, as owner-employer and that the Petitioner is not insulated from suit under 33 USC 902(21), 33 USC 905 and 33 USC 933(i).

Respectfully submitted,

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